74-0907-10715-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF PSYCHOLOGY

In the Matter of the Adoption of the Board of Psychology's Rules Relating to Licensure Fees, Minnesota Rules, Part 7200.6100, and 7200.6170.	**ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.26**

The Minnesota Board of Psychology (board) is seeking review and approval of permanent rules relating to licensure fees, which were adopted by the board pursuant to Minn. Stat. § 14.26. On August 16, 1996, the Office of Administrative Hearings received the documents from the board required to be filed under Minn. Stat. § 14.26 and Minn. R. 1400.2310.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY DECIDED AND ORDERED:

1. The agency has the statutory authority to adopt the rules.

2. The adopted rules are not substantially different from the rules as originally proposed.

3. The record for the adopted rules demonstrates a rational basis for the need for and reasonableness of the proposed rules as required by Minn. Stat. § 14.26, subd. 3 and Minn. R. 1400.2070.

4. The adopted rules are constitutional and legal within the meaning of Minn. R. 1400.2100, item E.

5. The rules were adopted in compliance with the procedural requirements of chapter 14 and Minn. R., chapter 1400 with the following exceptions:

A. The Notice of Intent to Adopt Rules first stated that the board intended to adopt the rules without a public hearing, and cited to the statute that allows health-related licensing boards to raise fees without a public hearing under certain circumstances. However, the next paragraph identified an agency contact person, and stated: "comments or questions on the rules and written requests for a public hearing on the rules" should be directed to her. There were 33 requests for a public hearing. A few

of the persons who requested a public hearing explicitly stated that they would comment more fully on the rule at the hearing.

B. The board's mailing of the Notice of Intent to Adopt Rules to the board's licensees, which was done pursuant to the additional notice requirement under Minn. Stat. § 14.22, was not mailed out 33 days before the end of the comment period as required by Minn. R. 1400.2080, subp. 6. It was mailed on July 22, which was 22 days before the end of the comment period on August 15. Therefore, the board did not provide the people who received the additional notice 30 days to comment on the proposed rules.

C. The analysis in the Statement of Need and Reasonableness regarding the reasonableness of the rules does not provide sufficient justification of the board's reasons for allocating the total amount needed to be raised between the various "classes" of fees.

D. The Statement of Need and Reasonableness does not provide a sufficient analysis of the factors set forth in Minn. Stat. § 14.131 as required by Minn. Stat. § 14.23.

The administrative law judge finds that, under the circumstances of this case, the defects in items C and D did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and thus constitute harmless error under Minn. Stat. § 14.26(3)(d)(1).

However, the defects in items A and B did deprive persons or entities of an opportunity to participate meaningfully in the rulemaking process. There was no corrective action taken to cure the error or defect in the proceeding. Thus, they do not constitute harmless error under Minn. Stat. § 14.26(3)(d)(1) or (2).

Therefore, the rules are disapproved and the administrative law judge recommends the following corrective action be taken by board:

a. the board must mail a letter to all of the persons who requested that a public hearing be held. The letter must indicate that an error was made in the Notice of Intent to Adopt regarding a right to a hearing, that there will be no public hearing in this matter, but that persons will have an additional 33 days from the date of the letter in which to submit comments on the proposed rule.

b. the board must reconsider the proposed rules in light of all of the comments received in response to the prior mailing of the Notice and the comments received from the letter required above; and

c. after completing the above two requirements, the board shall resubmit the proposed rules to the administrative law judge for review with an explanation as to what, if any, changes were made to the rules and if no changes were made, why not.

Dated this _____ day of August, 1996.

_____
Allan W. Klein
Administrative Law Judge

MEMORANDUM

Under Minn. Stat. § 14.26(3)(a), the administrative law judge is directed to review adopted rules for legality. As stated in the above order the rules failed to meet certain procedural requirements under chapter 14 and Minn. R. chapter 1400 which could not considered harmless error under Minn. Stat. 14.26(3)(d). Therefore, the rules are being disapproved until the required corrective measures have been taken by the board as outlined in the Order.

Minn. Stat. § 14.26(3)(d), provides that:

> the administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirements imposed by law or rule if the administrative law judge finds:
>
> (1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or
>
> (2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

The administrative law judge has determined that the error in the Notice of Intent to Adopt Rules suggesting that persons could request a public hearing, when no hearing was going to be held, did deprive persons of an opportunity to participate meaningfully in the rulemaking process. The board failed to correct this error.

The record indicates that the agency received 128 comments. Even though the notice began by stating that no hearing was required pursuant to Minnesota Statutes, section 214.06, subdivision 3, more that 25 persons requested that the board hold a public hearing on the proposed rules. In addition, some people who commented specifically indicated that they were not writing all of their comments to the board at this time, but would provide additional statements at the hearing.

Therefore, those persons who requested a hearing were deprived of an opportunity to participate meaningfully in the rulemaking process by not being able to comment on the proposed rules. Furthermore, this error cannot be deemed harmless when the board did not try to correct the error by at least contacting the people who requested a hearing to inform them that no hearing was going to be conducted and allowing them to submit additional comment by letter.

Likewise, without corrective action, the failure of the board to give the licensees the full 30 days to comment also deprived the persons of an adequate opportunity to participate meaningfully in the rulemaking process. Under Minn. Stat. § 14.22, the agency must make reasonable efforts to notify persons or classes of person not on its registered mailing list who may be affected by the rule. To meet the requirement of Minn. Stat. § 14.22, the board mailed a copy of the Notice of Intent to Adopt Rules to all of the licensees of the board.

However, this "additional notice" to the licensees was mailed out seven days after the 30 comment period had already started to run. The Notice of Intent to Adopt specifies that the public has 30 days in which to submit comments on the proposed rules. With the late mailing by the board, the comment period was shortened by seven to ten days, which is a significant amount of time. This error was noted by a few commentators, one of whom charged that the short notice (and other timing factors) would limit the ability of affected persons to respond to the proposed increases. The notice becomes ineffective if an adequate amount of time is not given for the public to comment thus depriving people of an opportunity to participate meaningfully in the rulemaking process. While there are situations where less than 30 days notice will be given due to independent newsletter publication dates and similar factors beyond the board's control, in instances where the board does control the timing (as it did here), there is no reason not to afford affected persons the full comment period.

Normally these defects would result in an Order that the board renotice to all persons and essentially begin the process afresh. However, the ambiguity in the Notice, when coupled with the practical realities of this case, suggest that some less drastic (and less expensive) remedy be fashioned. The realities are that the board has lost money every year since 1994, and the board is being forced by statute (and the Department of Finance) to increase fees substantially; that there are only a limited number of sources for the board to obtain fees; that the notice did generate a significant number and variety of comments which are already in the record; and that only a limited number of persons were actually prejudiced by the board's errors. Requiring that a new notice be sent to all of the board's licensees increases the Board's expenses out of proportion to any benefits that might flow from the additional comments. However, it is impossible to ignore those persons who wrote that they would provide their comments at the hearing. They (and others who requested a hearing) are entitled to have their comments considered by the board before it takes final action on the rules.

Therefore, the administrative law judge is recommending that the board should provide those persons who requested a public hearing with an opportunity to submit

additional comments that they may have presented at the hearing had one been held. The administrative law judge is also recommending that the board seriously re-examine all of the comments that were received in this rule proceeding to determine whether any adjustments can or should made to the proposed rule and if no changes are made, why not.

The administrative law judge also found defects in the lack of adequate analysis in the board's Statement of Need and Reasonableness with respect to the factors under Minn. Stat. § 14.131 and with respect to the reasonableness justification as to how the fees increases were allocated. However, the judge notes that these are rules adjusting license fees. Pursuant to Minn. Stat. § 214.06, subd. 1, fees collected by the board must equal to anticipated expenditures and that such fees shall be approved by the Department of Finance, as was done in this case.

It is easy for the board to rely on the Department of Finance's approval of the fees for adequate justification. However, as is evident in this case, an affected person (fee payer) often needs to have additional information, beyond Finance's approval, to make a determination as to the reasonableness of the board's actions. The licensees should be provided specific information as to why a particular fee was chosen for a particular license. For example, in this case, why was the fee of $375 chosen for an application for a licensed psychologist and only $250 chosen for an application for a licensed psychological practitioner? Why not $350 and $275? At least one commentator asked for a copy of the Statement of Need to answer such a question. That is the level of detail that should be in a SONAR in a case like this.

In addition, the board should have provided more detail of the factors listed under Minn. Stat. § 14.131. Many of these factors deal with cost analysis and would have addressed many of the comments that were received by the board. The administrative law judge recommends that future rulemakings include a more detailed analysis of these factors in the Statement of Need and Reasonableness.

These two defects, however, are found to be harmless error in the context of this case. Requiring the board to rewrite the SONAR and recirculate it to all who got a copy of the original, is simply not warranted in this case. The defects are not important enough. They are noted, rather, as guidance for future rulemakings.

Pursuant to Minn. Stat. § 14.26, subd. 3(b) and Minn. R. 1400.2300, subp. 6, this order will be submitted to the chief administrative law judge for approval.

A. W. K.